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No. 82-194

IN THE

Supreme Court of the United States

October Term, 1981

INTERNATIONAL RECTIFIER CORPORATION,
Petitioner,

v.

PETER R. COHEN, individually, and DEBORAH D. RIORDAN, as the Administratrix of the Estate of Edward Joseph Riordan, Deceased,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION

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1982—Northwest Brief Printing Co., 3010 2nd St. No., Minneapolis 55411—588-7506

Question Presented

Whether this Court should grant a petition for certiorari to review an interlocutory determination by a court of appeals that a district court's exercise of ancillary jurisdiction over a conflict concerning attorneys' fees arising out of a federal antitrust case should be affirmed at the time subject to possible reexamination after the record has been more fully developed at trial.

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BRIEF IN OPPOSITION

Statement of the Case

Petitioner International Rectifier Corporation ("Rectifier"),[1] in the Statement of the Case contained in its Petition for Certiorari ("Pet.") at 2-5,[2] argues that, when

[1] Respondents draw the Court's attention to the fact that Rectifier has not fulfilled the requirements of Supreme Court Rule 28.1 concerning the listing of all parent companies, subsidiaries, and affiliates of Rectifier.

[2] Inasmuch as Rectifier has not presented to this Court any questions concerning the merits of the preliminary injunction, respondents will not address the merits here. The Court should note, however, that the district court's preliminary factual findings concerning the merits contradict the innuendos present in Rectifier's Statement of the Case. Moreover, no affidavits relating to the factual basis for the district court's ancillary jurisdiction or the factual basis for the district court's injunctive orders were filed by Rectifier with the district court. *See* Pet. App. at 23. Nor did Rectifier request an evidentiary hearing. *Id.*

the district court on August 14, 1975 dismissed the settled antitrust action before it "without prejudice and without costs or attorneys' fees," the district court "did not retain jurisdiction in any respect, let alone with respect to attorneys' fees." Pet. at 4. Rectifier has failed to call this Court's attention to a letter from defense counsel to counsel for Rectifier, dated August 12, 1975 and filed and lodged with the district court, which commemorated the understanding of all concerned with respect to the effect of the dismissal about to be procurred as a result of the settlement on jurisdiction over attorneys' fees claims. That letter (Exhibit A to the Petition for Temporary and Permanent Injunction and Other Relief) stated:

> It is the understanding of Defendants that neither the "Settlement Agreement" nor the "Stipulation of Dismissal with Prejudice" in this case is intended to affect one way or another whether the United States District Court for the District of Minnesota would have jurisdiction to hear or resolve any claim against Rectifier which is based upon or related to the filing, prosecution or settlement of this case and which is made by any attorney or law firm who has been, or who may claim to have been, counsel for Rectifier or for any of the other "parties of the first part" to the Settlement Agreement.

See Pet. App. at 14-15. As the district court itself stated:

> The settlement agreement and the dismissals with prejudice of the main action and the related actions . . . were filed and lodged in this Court together with [the] side letter dated August 12, 1975, from all defendants to Rectifier. . . .

Pet. App. at 14.

The district court's subsequent dismissal of the settled

antitrust action on August 14, 1975 was pursuant to the Stipulation of the parties referred to in the letter. The clear intent, as reflected by the letter, was that dismissal of the antitrust action was not to affect the district court's equitable ancillary jurisdiction to resolve all fee disputes arising out of the case.

In the proceedings below, the same district court, Chief Judge Miles W. Lord again presiding, explicitly recognized this. The court noted both the August 12, 1975 side letter and a provision in the August 14, 1975 settlement agreement between the parties whereby Rectifier agreed to indemnify other parties from any and all attorneys' fee claims involving liens on the settlement proceeds brought by counsel for Rectifier. *See* Pet. App. at 14-15. Then, after discussing the inherent nature of its ancillary jurisdiction and the fact of its existence, *see* Pet. App. at 24-34, the court addressed the side letter and its ramifications:

> As noted above, Rectifier asserts that the side letter from the antitrust defendants, setting forth their understanding that the settlement and dismissal with prejudice was not intended to affect "one way or another" future jurisdiction of this Court over an attorney-client fee dispute, was intended to abandon jurisdiction concerning such a dispute or waive jurisdiction. C & R [Cohen & Riordan] asserts that by the side letter Rectifier and C & R intended to reserve ancillary jurisdiction for all future fee disputes without involving the antitrust defendants if possible.
>
> The side letter is careful to state that it is "the understanding of Defendants that the dismissal of the main action shall not affect "one way or the other" the ancillary jurisdiction of this Court over future fee disputes between Rectifier and its former attorneys (RM&S) or then attorneys (C&R)." The understand-

> ing of Rectifier and its then attorneys, C&R, is left unstated. It appears from Cohen's affidavit, and without challenge from Rectifier, that the parties to the main action intended to end jurisdiction over the antitrust defendants and preserve jurisdiction over future disputes between Rectifier and its attorneys to the extent that they could do so. The parties to the main action were represented by competent counsel who are presumed to know the law, and to therefore also know that if they did not affect this Court's ancillary jurisdiction "one way or another" that jurisdiction would continue to exist. The fact that the antitrust defendants obtained an indemnity and a defense from Rectifier in the event this Court's ancillary jurisdiction was invoked supports C&R's position that all parties were well aware that the Court had and would continue to have ancillary jurisdiction over any later attorney-client fee dispute. The Court therefore accepts C&R's position that jurisdiction over this dispute was not intended to be abandoned but rather intended to be preserved.

Pet. App. at 41-42.

On appeal by Rectifier, the United States Court of Appeals for the Eighth Circuit affirmed the district court's judgment that its earlier issued preliminary injunction should remain in effect. *Cf.* Pet. App. at 1 and 66. Although thus implicitly affirming the propriety of the district court's discretionary exercise of its ancillary jurisdiction, the court of appeals noted that "[t]his interlocutory determination is without prejudice to the right of International Rectifier Corporation to raise the issue of the lack of ancillary jurisdiction on appeal after the district court has decided the case on the merits." Pet. App. at 1.

Reasons for Denying the Writ

I.

The Interlocutory Nature of the Matter Makes It Inappropriate for Review by the Court at this Time.

Petitioner Rectifier is seeking to have the Court grant interlocutory review of the assertion by a federal district court of ancillary jurisdiction. Such review would be premature and inappropriate here, where the jurisdictional facts found by the district court are neither final nor complete. The trial on the merits will develop additional factual evidence to support both the existence, and the discretionary exercise, of ancillary jurisdiction. For example, it is expected that Rectifier's agent will admit that the August 12, 1975 letter from the antitrust defendants to Rectifier referred to above was intended to preserve ancillary jurisdiction as between respondents and Rectifier for any future fee dispute to the extent that it was possible for the parties to do so. This Court has traditionally denied certiorari in interlocutory matters where the factual and therefore the legal issues are not finally decided in the lower courts. *See, e.g., Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R.*, 389 U.S. 327 (1967); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 257-258 (1916) (Lack of finality "of itself alone furnished sufficient ground for the denial.")

Rectifier has already sought and obtained interlocutory appellate verification of the existence of ancillary jurisdiction. By affirming the preliminary injunction issued by the district court in the face of Rectifier's arguments concerning jurisdiction, the court of appeals implicitly affirmed the existence of ancillary jurisdiction and the district court's discretionary exercise thereof to date. By ac-

knowledging in its brief opinion that Rectifier was free to raise the issue later after final adjudication of the jurisdictional facts, the court of appeals in so many words stated that its affirmance was only interlocutory. Thus it has not yet finally passed on jurisdiction, but it has affirmed its existence insofar as the facts appear to date.[3] There has thus not yet been a final determination below on any of the jurisdictional issues. This Court has traditionally denied certiorari where final determination is left until after a trial on the merits. *Cf. Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R. Co., supra,* 389 U.S. at 328 ("[B]ecause the Court of Appeals has remanded the case, it is not yet ripe for review by this Court.").

II.

Under the Available Facts, Exercise of Ancillary Jurisdiction Was Proper Here and No Circuit Conflict Exists.

Under the facts available at this stage of the proceedings, the district court properly exercised ancillary jurisdiction over the fee dispute before it. The district court's well-reasoned "Order and Memorandum" exhaustively explains the reason behind the existence of ancillary jurisdiction in a situation such as this and the reasons for its discretionary exercise in this case. *See* Pet. App. at 24-44.

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[3]Rectifier's argument that the court of appeals somehow "abdicated" its appellate duty is thus revealed as specious at best. By its affirmance, the court of appeals implicitly determined that there appeared a sufficient jurisdictional base for the case to proceed at this time. No rule requires a circuit court to make a final ruling on an interlocutory challenge to jurisdiction made as a part of an appellant's 28 USC § 1292 (a)(1) interlocutory appeal from the grant of a preliminary injunction. To the contrary, the circuit courts are free to note probable jurisdiction and defer final decision on the jurisdictional issues until after a trial on the merits and a complete and final record is available. That is what the court of appeals has done here.

That discussion need not be reiterated here. It is worth the emphasis, however, to note that this Court has both long recognized and recently reaffirmed that inherent ancillary jurisdiction is part of the historic equity jurisdiction of the federal courts and exists even years after the main action has become final. *Sprague v. Ticonic National Bank*, 307 U.S. 161 (1939), approved in *White v. New Hampshire Dept. of Employment Sec.*, —— U.S. ——, 102 S. Ct. 1162, 1166 n. 13 (1982).[4] Where, as here, the main action is a federal antitrust case and the current dispute concerns settlement provisions for attorneys' fees, the private attorney general policy underlying Section 4 of the Clayton Act further enhances both the need for and existence of ancillary jurisdiction.[5]

Viewed in the light of Section 4, Rectifier's purported "conflict" in the circuits, *see* Pet. at 6-7, is shown to be illusory. Neither *Bounougias v. Peters*, 369 F.2d 247 (7th Cir. 1966) *cert. denied*, 386 U.S. 963 (1967), nor *Taylor v. Kelsey*, 666 F.2d 53 (4th Cir. 1981), the two courts of

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[4]Neither *Sprague* nor *White* is cited to this Court by Petitioner Rectifier.

[5]Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, *and the cost of suit, including a reasonable attorneys fee.*" (emphasis added).

As the district court explained:

> The policy of Section 4 requires that the antitrust defendants pay the successful plaintiff's attorneys a reasonable fee in order to encourage attorneys to act as private attorneys-general in enforcing the antitrust laws. The reasonableness of that fee, whether contractual between the parties, or fixed by the Court, or in combination, is within the subject matter jurisdiction of the Court that tried the main antitrust case. *Farmington Dowel Products Co. v. Forster Mfg. Co.*, 421 F.2d 61, 86-92 (1st Cir. 1969); *In Re Uranium Antitrust Litigation*, 617 F.2d 1248, 1261 (7th Cir. 1980); *Perma Life Mufflers v. International Parts Corp.*, 392 U.S. 134, 88 S. Ct. 1981, 20 L.Ed.2d 982 (1968).
>
> Pet. App. at 35.

appeals decisions principally relied on by Rectifier for the rule it favors, involved a situation where the main action was a federal antitrust case. *Bounougias* involved a suit to rescind payment of a contingent fee earned in a personal injury case tried in federal court under diversity jurisdiction. The fee suit was originally filed in state court and the proceedings remained there for four years and were ready for trial when defendants removed to federal court. 369 F.2d at 247-48. *Taylor* involved a fee dispute between two attorneys where one had brought in the other to act as co-counsel in a water pollution case pending in federal court. Between the two of them, they agreed on a split of the first attorney's contingent fee. Before the case settled, the first attorney dismissed the second, and the second then tried to intervene in the main action to claim a fee from the first. 666 F.2d at 54. In each case, it was held that, given the particular set of facts, no ancillary jurisdiction should properly be exercised.[6] Thus, neither *Bounougias*

[6] *Muirhead v. Bonar*, 556 F.2d 735 (5th Cir. 1977), also cited by Rectifier, involved a suit for fees first brought in state court which defendants twice attempted unsuccessfully to remove. The attorney seeking fees was initially retained by defendants to represent them in a Title VII matter, but was dismissed by them before suit was filed. Upon the second removal attempt, the district court awarded the plaintiff attorney fees based on the bad faith of defendants trying twice to remove. The appeal concerned that award of fees; the Fifth Circuit did not rule on the existence *vel non* of ancillary jurisdiction. Indeed, in *Broughten v. Voss*, 634 F.2d 880 (5th Cir. 1981), which Rectifier cites, the Fifth Circuit stated its agreement with the general rule that federal district courts have ancillary jurisdiction to resolve fee disputes arising from cases before them. 634 F.2d at 882-3. It merely held that, in a situation where all the court is asked to do by the litigants is approve the voluntary withdrawal of counsel from the case, it is improper for the court on its own initiative to broach the subject of the reasonableness of fees. The court went on to state that "[i]f, upon withdrawal, counsel is unable to secure payment for his services, the court may assume jurisdiction over a claim based on a charging lien over the proceeds of the lawsuit." 634 F.2d at 883.

It should also be noted that in *Andrews v. Central Surety Insurance Co.*, 295 F. Supp. 1223 (D. S.C. 1969), upon which Rectifier relies, the district court concluded that it *did* have ancillary jurisdiction over the attorneys' fees dispute before it.

nor *Taylor* involved the policy of Section 4 of the Clayton Act or the federal policy of inherent equity jurisdiction to protect attorneys' rights to fees.[7] Indeed, when the Fourth Circuit was presented with the question of ancillary jurisdiction over an attorneys' fee dispute arising from an antitrust case, it *upheld* the exercise of such jurisdiction. *American Federation of Tobacco Growers v. Allen*, 186 F.2d 590 (4th Cir. 1951). *Taylor* does not purport to change that rule. Moreover, since the *Bounougias* rule is founded on the premise that attorney-client fee disputes of the type found in *Bounougias* have no "direct connection" to the main action, the reasons for the existence of ancillary jurisdiction are never relevant: the conclusionary premise dictates the result. Not surprisingly, the *Bounougias* rule appears to have been developed to discourage resort to the federal courts in cases involving no federal issue or federal policy. Where § 4 of the Clayton Act is involved, it supplies a "direct connection."

Thus, inasmuch as no square circuit conflict exists and this case is by no means in conflict with the rule of *Sprague v. Ticonic National Bank, supra*, no question requiring review by this Court is presented. *Cf.* Supreme Court Rule 17.1(a) & (c).

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[7]Only one minority view case, *Minersville Coal v. Anthracite Export Ass'n*, 55 F.R.D. 429 (N.D. Pa. 1972), concerned an antitrust case as the main action. That district court did not consider any federal policy or even the issues of expedition, economy, and justice; it merely followed *Bounougias*.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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